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No. _____

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In The Supreme Court of the United States

JOHN B. GOLDHAMER,

Petitioner,

v.

DEBORAH E. COHEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED FOR REVIEW

1. In 2000, the Supreme Court of the United States reinforced "Parental Constitutional Rights" in Troxel v. Granville. Will the Supreme Court of the United States address and strengthen non-custodial parents or "Father's Constitutional Rights?"

2. Is visitation a protected right for both parents and children, guaranteed by the United States Constitution and not to be eliminated by a custodial parent, or government intervention unless there is a compelling reason, such as abuse?

3. Can a court or a custodial parent eliminate a non-custodial parent's Constitutional Right to agreed upon visitation with his or her own child without clear and convincing evidence or a compelling reason such as abuse?

4. If a parent is not available for visitation with his or her own child through no fault of his or her own; (for instance a permanent job requirement such as frequent out of town travel), is there a "Carryover" of visitation to the next available date, provided the date is agreed upon by the parities?

5. Should a court establish a "Reasonability Test" to determine if visitation is reasonable, such as a return of four mid-week overnight visitations per month, or only 13% of a child's month (4 Days / 30 days) for a boy who is near eleven?

6. Should the preference of a child to spend overnight mid-week visitation with his father be valued and given greater weight in the decision, and does a child have a Substantial Constitutional Right not to have his or her visitation reduced by a custodial parent, court, or government intervention, unless there is a compelling reason, such as abuse?

7. Did the Appellate Courts of Virginia abuse their discretion in disregarding the testimony of Mr. Goldhamer's psychologist, Dr. Adelaide Simpson, Ph.D., who stated that in her professional opinion that midweek overnight visitation was beneficial to the parties' child, and the evidence that Johnny had a history of 18 months of quality visitation of two midweek overnight visits per week with Mr. Goldhamer when Mr. Goldhamer was in town, without incident?

8. Did the Appellate Courts of Virginia abuse their discretion in disregarding the evidence that Ms. Cohen suddenly without explanation reduced the child's midweek Constitutional Right to visitation with his father, Mr. Goldhamer, voided the oral agreement between the parties, and the fact Ms. Cohen would not explain to the child why his right to visitation with Mr. Goldhamer had changed?

9. Since the federal executive government and two of the three branches of state government are promoting "Fatherhood Legislation" to encourage fathers to have more "Visitation" with their children, should the Judicial Branch of the Federal and state governments resolve that Visitation is a protected right, and a reduction of reasonable visitation, is not appropriate unless there is a compelling reason, such as abuse?

10. Did the Supreme Court of Virginia abuse its discretion by twice denying hearing this case, considering the numerous abuses of discretion by the Court of Appeals of Virginia?

11. Did the Court of Appeals of Virginia abuse its discretion by substituting the word "Visitation" when quoting a "Custody" case, thereby changing the entire meaning of case law and then referring to the new meaning of the case as established precedent?

12. Is the Petitioner entitled to a response to "Petitioner's" timely "Motion for Verified Taxable Costs" pursuant to Rule 5A:30 of the Rules of Virginia Supreme Court filed with the Clerk of the Court of Appeals within ten days of the opinion?

13. Is Petitioner entitled to know the reasons why attorney fees were denied, and should attorney fees and costs both in the Circuit Court and the Court of Appeals be awarded to the Petitioner since the "Preponderance of Use" of the pages of the Joint Appendix was for the issue won by the Petitioner for the calculation of child support, stemming from the Respondent's deceitful fabrication of her total income in order to receive more child support money?

14. Should attorney fees and costs in both the Supreme Court of the United States and the Supreme Court of Virginia be awarded to the Petitioner considering the Virginia Courts abuse of discretion, Respondent's elimination of a parent's and child's Constitutional Rights and unwillingness to reasonably resolve the visitation issue?

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PARITIES TO THE PROCEEDING

John B. Goldhamer, **Petitioner,**
9407 Emmett Court
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v.

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(State court of last resort denying discretionary review)
Petition to Remand Financial Portion of Case to Trial Court
Denied - September 7, 2000
Petition for Rehearing - Denied - July 21, 2000
Petition for Appeal - Denied - June 22, 2000

In the Court of Appeals of Virginia:
Petition for Rehearing En Banc - Denied - April 25, 2000
Petition for Rehearing - Denied - April 25, 2000
Decision of the Court of Appeals of Virginia
Calculation of Child Support - Won
Visitation - Denied - March 7, 2000

In the Circuit Court of Henrico County:
(J & D R Court Appeal)
Order for Visitation and Child Support - Judge Tidey
Ordered - June 8, 1998

In the Juvenile and Domestic Relations District Court of Henrico County:
(Original Jurisdiction)
Judge Elizabeth Oxenham
Order for Visitation and Child Support - October 15, 1997

> "Amend to eliminate the mid-week overnight visitation. Father is to have evening visitation rights from after school until 7 PM on Thursday nights when he's not out of town on business. All other visitation and custody provisions remain the same."

JURISDICTION

As required in Rule 13 of the Rules of the Supreme Court of the United States, effective May 3, 1999, this timely Petition for Writ of Certiorari to the Supreme Court of the United States is filed within 90 days after entry of the state court of last resort denying discretionary review; namely the Supreme Court of Virginia denial of the Appellant's Petition for Rehearing, July 21, 2000, asserting constitutional rights.

Under 28 U.S.C. § 1257, a party may file a petition for a Writ of Certiorari if the highest state court has denied any claim asserted under the Constitution. The federal questions appealed must be raised in the state courts, and in most cases in conformity with state rules of procedure.

State procedural rules regarding standing to raise a constitutional claim and mootness of a case are federal questions, and will not bar the Supreme Court review. In other words, visitation is an automatic protected right, under the United States Constitution! Liberty interests are represented by fundamental Constitutional Rights under the Fourteenth Amendment. These rights are automatic, with or without the preservation in a lower trial or circuit court.

Appellant preserved the federal question by providing a list of Exceptions to the Order to the Circuit Court of the County of Henrico dated July 14, 1998 stating:

1. Reduced the Defendant's right to visit with his son; (Joint Appendix for the Court of Appeals of Virginia, p 330).

Moreover, the power of the United States Supreme Court to review state court decisions in cases involving matters of federal law to ensure that the States act in conformity to the federal Constitution has been well established for many years in Martin v. Hunter's Lessee, 14 U.S. (Wheat) 304 (1816).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Visitation is an automatic protected right, under the United States Constitution. Liberty interests are represented by fundamental Constitutional Rights under the Fourteenth Amendment. These rights are automatic, with or without the preservation in a lower trial court.

The Supreme Court of the United States strengthened "Parental Constitutional Rights" from the Fourteenth Amendment in Troxel v. Granville, 530 U.S. ___ (2000), No. 99-138 decided June 5, 2000.

The Supreme Court of the United States ruled in Michael H. v. Gerald D., 491 U.S. 110 (1989) that a father of a child from an "adulterous affair with a married women," who requested "reasonable visitation rights" did not have Fourteenth Amendment's Due Process Clause rights to expect "Constitutional visitation rights" because the state has an interest in protecting marriage and family relationships. The Appellant's case differs since the parties were married, and the child was born in legal wedlock.

The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests, Washington v. Glucksberg, 521 U.S. 702, 720, (1997) including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, e.g., Stanley v. Illinois, 405 U.S. 645, 651. Pp. 5-8 (1972).

The Fourteenth Amendment's Due Process Clause provides Mr. Goldhamer, the Appellant, protection against non-custodial parent and government interference with certain fundamental rights and liberty interests such as

elimination of reasonable visitation without a compelling reason.

In Santosky v. Kramer, 455 U.S. 745 (1982) the Supreme Court of the United States ruled that because of the importance of the individual interests and the risk of erroneous deprivation, the allegations supporting termination of parental rights must be supported by "clear and convincing evidence."

Under Williams v. Williams, 256 Va. 19, 501 S.E.2d 417 (1998). The Supreme Court of Virginia ruled that the trial court cannot interfere with the constitutional right to raise a child unless the state has a compelling interest. A detriment to the child's welfare would constitute a compelling interest, but the state cannot intervene unless a detriment exists by a showing of clear and convincing evidence. The similarities between Appellant's case and the Williams case are that there was no evidence of parental abuse or neglect, the parents are mentally and physically fit, and are capable to meet their child's needs, and they have joint legal custody.

The Federal Welfare Reform Act of 1996, Public Law Subtitle 1(42 USC Sec. 669b) Enhancing Responsibility and Opportunity for Non-Residential Parents, which authorized the Department of Health and Human Services, Office of Child Support Enforcement, to award grants to states for access to Visitation Programs.

In March 2000, Vice President Gore announced:

> "[T]hat Health and Human Services (HHS) Secretary Donna Shalala has approved waivers in ten states to promote responsible fatherhood by helping more fathers provide emotional and financial support to their children. The waivers are part of a

demonstration project that aims to help young, low-income, never-married fathers obtain employment, make child support payments and learn parenting skills." (http://www.npr.gov/library/news) [Emphasis added]

Rule 5:25 of the Rules of Virginia Supreme Court states:

"Question to Be Considered. Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." [Emphasis Added]

§20-124.3 of the Code of Virginia states in part:

"7. The Reasonable Preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference."

§ 8.5A-102 of the Code of Virginia, defines a letter of credit.

STATEMENT OF THE CASE

REVIEW OF A STATE-COURT OF LAST RESORT

Appellant asks for a review of a decision by a state court of last resort.

HOW THE FEDERAL QUESTION WAS RAISED

Visitation is an automatic protected right, under the United States Constitution. Liberty interests are represented by fundamental Constitutional Rights under the Fourteenth Amendment. These rights are automatic, with or without the preservation in a lower trial court.

Nevertheless, previous opposing counsel erroneously stated in Appellee's Brief in Opposition to Petition for Appeal, filed with the Supreme Court of Virginia:

> "First Mr. Goldhamer did not properly preserved this as a grounds of objection to the trial court's order (or even present this position to the Court of Appeals). Having failed to comply with Rule 5:25 and 5:18 [Workmen's Compensation Commission] of the Rules of the Supreme Court of Virginia, his petition must be dismissed." [Clarification added]

Rule 5:25 of the Rules of the Virginia Supreme Court states:

> "Question to Be Considered. Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." [Emphasis Added]
>
> "General Consideration. "Purpose of the Rule.
>
> "This rule was adopted not to obstruct petitioners but to make more certain the attainment of the ends of justice. It was intended to put the record in such shape that the case may be heard in the appellate court upon the same record upon which it was heard in the trial court...." [Emphasis Added]
>
> This rule was applied in order that the trial judge could rule intelligently and avoid unnecessary appeals, reversals and mistrials. Woodson v. Commonwealth, 211Va.285, 176 S.E. 2d 818 (1970)

Appellee is wrong! From the beginning, Appellant preserved his "Constitutional Right" to visit with his son, and objected to the elimination of midweek visitation, and midweek carryover visitation. In the Joint Appendix for the Court of Appeals of Virginia, pages 330, 331, & 332 Appellant provided lists of Exceptions to the trial Court order dated July 14, 1998 as follows:

> "DEFENDANT'S EXCEPTIONS TO ORDER REGARDING VISITATION
>
> COMES NOW THE DEFENDANT, John B. Goldhamer, in person and by Counsel, and for his exceptions to the decision of the Court in eliminating mid-week carryover visitation and limiting mid-week overnight visitation with the parties' eight year old son, in that the Order of the Court:
>
> 1. **Reduced the Defendant's right to visit with his son** [Emphasis added] (Full Reproduction in Appendix)

This "Right to visit with his son," is established and guaranteed by the United States Constitution, which ensures rights in the United States as the "Supreme Law of the Land."

In addition, Appellants Brief to the Court of Appeals of Virginia, page 1, stated:

> QUESTIONS PRESENTED REGARDING MIDWEEK OVERNIGHT VISITATION
>
> "1. Did the trial Court err in eliminating Mr. Goldhamer's midweek carryover overnight visitation and midweek overnight visitation with the parties' eight year old son?"

In Appellants Brief to the Court of Appeals of Virginia we further approached "Visitation Privileges and

Rights." On page 21 of Appellant's Brief to the Court of Appeals of Virginia, we touched on this issue by stating:

> "This visitation situation [Appellant's] is analogous to Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 11 (1986)." [Clarification Added]

The Eichelberger decision went on to say:

> "The relationship between a child and non-custodial parent should not be subject to the dictates of the custodial parent unless circumstances justify placing restrictions or conditions on the visitation privileges."

Therefore, the issue was preserved and timely raised in the trial Court and the trial judge could rule intelligently to avoid unnecessary appeals, as required by Rule 5:25 of the Rules of Virginia Supreme Court. Thus, based on state procedures, and the Rules of the Supreme Court of the United States the issue was raised and passed giving the Supreme Court of the United States jurisdiction to review the judgement, and grant a Petition for Writ of Certiorari.

Raising the constitutionality of visitation issue in a juvenile court or circuit court in 1997, and 1998 was a moot point, since at the time there were no significant cases on parental rights, and the trial judges could only rule on matters concerning the Commonwealth of Virginia and not decide federal constitutional issues.

It was not until after the juvenile and circuit court trials that the Supreme Court of the United States and the Supreme Court of Virginia ruled on parental rights. Although these rights always existed, they were not addressed until recently.

Nevertheless, in Appellant's Petition for Rehearing and Suggestion for Hearing En Banc to the Court of Appeals

of Virginia, Page 8, Appellant continued to raise the constitutionality question in detail by writing the following:

THE COURT INTERFERED WITH MR. GOLDHAMER'S CONSTITUTIONAL RIGHTS AS A PARENT WITHOUT A COMPELLING REASON

"Visitation is a special [protected] right of a parent, not an optional offer!"

"Under Williams v. Williams, 256 Va. 19, 501 S.E.2d 417 (1998), the Supreme Court of Virginia ruled that the trial court cannot interfere with the constitutional right to raise a child unless the state has a compelling interest. A detriment to the child's welfare would constitute a compelling interest, but the state cannot intervene unless a detriment exists by a showing of clear and convincing evidence. The similarities between the two cases are that there was no evidence of parental abuse or neglect, the parents are mentally, physically fit, and are capable to meet their child's needs."

"Initially, the case was in front of the Henrico County J & D Court for the return of the mid-week overnight carryover visitation. Without the request of Ms. Cohen, Judge Oxenham eliminated all of Mr. Goldhamer's mid-week overnight visitation, both regular and carryover, so that Johnny had to be back at Ms. Cohen's by 7:00 PM [only on Thursdays when] Mr. Goldhamer was in town. This was not because Mr. Goldhamer was a detriment to their son, but only because Dr. Crowley stated that in his opinion it was too stressful for Johnny to go between his own childhood home at his Father's, and his Mother's home. Henrico County J & D Court Judge

> Oxenham took it upon her self to eliminate all mid-week overnight visitation." [Clarification Added]
>
> "Neither the J & D Court nor the Circuit Court had a compelling interest or reason to prevent Johnny from allegedly being stressed, and interfered with Mr. Goldhamer's constitutional right to raise his son as he saw fit, by eliminating his and Johnny's mid-week overnight visitation. The Court of Appeals let this decision stand, continuing to interfere with Mr. Goldhamer's constitutional rights as a parent."

The same issues were raised in Appellant's Petition for Rehearing filed with the Supreme Court of Virginia. Both of Virginia's appellate courts denied discretionary review on the constitutionality of visitation. The Supreme Court of Virginia, the state court of last resort, denied Appellant's Petition for Rehearing on July 21, 2000, and Appellant's Petition for Appeal was denied on June 22, 2000. The Court of Appeals of Virginia, denied Appellant's Petition for Rehearing and Suggestion for Hearing En Banc, on April 25, 2000.

STATEMENT OF THE CASE, IN DETAIL

This appeal arises out of the elimination of Constitutional visitation rights from Mr. Goldhamer in stripping his mid-week overnight visitation with Johnny, now almost eleven years old. It also involves the denial of Mr. Goldhamer's request for attorney fees and costs in the trial Court and Court of Appeals of Virginia, Supreme Court of Virginia, and now the Supreme Court of the United States.

Appellant, referred to as Mr. Goldhamer, and Appellee, referred to as Ms. Cohen, were married on October 24, 1987. Their son, Johnny, was born January 1, 1990. The parties separated on August 21, 1995, signed a Property

Settlement Agreement on January 31, 1996, and divorced in Henrico Circuit Court on October 25, 1996.

Mr. Goldhamer is an Interstate Corporate Income Tax Auditor with the Virginia State Department of Taxation. He has worked for the Tax Department for almost twenty-five years. As a Tax Department employee, he must travel the United States to the location of the corporation's headquarters; to conduct tax audits every other week.

Truly, this case started in 1997 when Ms. Cohen originally refused to exchange financial information for the calculation of child support, as the parties Separation Agreement required. Appellant's Brief in the Court of Appeals of Virginia page 5 and 6 states:

> "The Separation Agreement also provided that the parties exchange income information by February 15 of each year. (J.A. p. 13) In February 1997, pursuant to their Property Settlement Agreement, (J.A. p. 13), Mr. Goldhamer requested that Ms. Cohen exchange income information with him. He provided her with his income information, but she would not provide her income information to him. (J.A. pp. 32-34). It was after this request for financial information that Ms. Cohen unilaterally cut off the carryover midweek visitation, [that Johnny and his father had enjoyed for over eighteen (18) months] thus breaching the oral agreement of the parties. Ms. Cohen refused to tell Johnny why he was seeing his father less. Neither Mr. Goldhamer nor Johnny knew why the carry over midweek visitation was cut off by Ms. Cohen. When asked, Ms. Cohen told Mr. Goldhamer:

> **"I don't have to tell you why I'm reducing your visitation."** (J.A. p. 225, lines 14-15)"
>
> "Without discussing it with Mr. Goldhamer, Ms. Cohen cut off their verbal agreement and discontinued the carry over of the midweek visitation that Mr. Goldhamer and Johnny had enjoyed. (J.A. p. 311) This happened on February 21, 1997, right after the first time Mr. Goldhamer had asked for her financial information provided by their Agreement. (J.A. pp 32-33)"
>
> "When Mr. Goldhamer wanted to pick the midweek night when he and Johnny could visit, on Monday, May 12, 1997 Ms. Cohen, by fax, informed Mr. Goldhamer "**... you will be picking up Johnny on either Tuesday or Thursday evenings until further notice.**"(J.A.p.40)[Reproduced in Appendix]

Ms. Cohen as custodial parent, eliminated a non-custodial parent's agreed upon visitation with his own child, and intervened with a right established and guaranteed by the United States Constitution, without clear and convincing evidence nor a compelling reason, such as abuse.

As his parents taught him, Mr. Goldhamer began the court process by filing his case. Mr. Goldhamer's Petition for Rehearing, Supreme Court of Virginia page 1 stated:

> "This case started in the Henrico County Juvenile and Domestic Relations Court for the return of the mid-week overnight carryover visitation. Judge Elizabeth Oxenham unconstitutionally, without a compelling interest such as a detriment to the child's welfare, nor clear and convincing evidence, eliminated all of Mr. Goldhamer's mid-week overnight visitation, both regular and carryover, so

that Johnny had to be back at his mother's by 7:00 PM, only on Thursday night, when Mr. Goldhamer was in town. All other visitation and custody provisions remained the same."

"The case was appealed to the Henrico County Circuit Court. The trial Court in this visitation and child support proceeding took evidence by deposition on June 2, 1998 and ore tenus on June 8, 1998. There were numerous written exhibits introduced at Court and through the deposition. Several letters from both counsels were submitted to the Court along with numerous Draft Orders. The Court rendered four letter opinions that became the Final Order for Visitation and Child Support entered July 23, 1998. Mr. Goldhamer filed an appeal to the Court of Appeals of Virginia on August 19, 1998.

MID-WEEK OVERNIGHT VISITATION DECISION

The Court of Appeals of Virginia stated in its' opinion in this case:

"In matters of custody, visitation, and related child care issues, the court's paramount concern is always the best interests of the child." Farley v. Farley, 9 Va. App. 326, 327-28, 387 S.E.2d 794, 795 (1990). "In matters of a child's welfare, trial courts are vested with broad discretion in making the decisions necessary to guard and to foster a child's best interests." Id. at 328, 387 S.E.2d at 795 (citing Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986)). "A trial court's determination of matters within its discretion is reversible on appeal only for an abuse of that

discretion.... and a trial court's decision will not be set aside unless plainly wrong or without evidence to support it." Id. (citations omitted).

In the determination of a change of **visitation**, the trial court "must apply a two-pronged test: (1) whether there has been a change in circumstances since the most recent **[visitation]** award, and (2) whether a change in **[visitation]** would be in the best interests of the child." Visidides v. Derr, 3 Va. App. 69, 70, 348 S.E.2d 40, 41 (1986) (citation omitted)." [Emphasis added]

THIS WAS A VISITATION NOT A CUSTODY CASE

We raised this issue in Appellant's Petition for Rehearing, to the Court of Appeals of Virginia page 9, Appellant's Petition for Appeal to the Supreme Court of Virginia, page 10, and Appellant's Petition for Rehearing to the Supreme Court of Virginia, page 7. We stated:

"This case is about "Reasonable" mid-week overnight visitation, not about custody! Visidides v. Derr, 3 Va. App, 69, 70, 348 S.E. 2d 40, 41(1986) was a custody case not a visitation case. Changing custody requires a higher standard than making a visitation change. It is not appropriate to interchange the two types of cases and apply the same standards, simply by substituting key words, and then referring to the new meaning of the case as established precedent."

"Children are not property. However as an analogy, if the case discussed "ownership of property," but the words "rental of property" were substituted, which has a different standard, this stroke

changes the entire meaning and decision of the case, and is an abuse of discretion by the court."

"Generally, bracketed words clarify words in the quotation. All language in a statute or case law should be treated as significant. New words may not be substituted for either "Case Law," or "Statutory Law," if they change the meaning."

"For authority, we need only examine West Publishing Co. Legal Problem Solving – Analysis, Research and Writing, which states:

> "When you do quote, quote a logical unit of language, omitting that which is not pertinent; but be certain that you do not change the meaning of the language by your omissions. Quote accurately." (Chapter 11–I, Arguments to Courts, Writing your Argument: Common Errors to Avoid page 273)"

"A court could sanction an attorney for substituting words in a case."

THE COURT OF APPEALS ABUSED ITS DISCRETION BY SUBSTITUTING WORDS IN A QUOTED CASE

In this case, the Court of Appeals stated:

"In the determination of a change of **visitation**, the trial court "must apply a two-pronged test: (1) whether there has been a change in circumstances since the most recent **[visitation]** award, and (2) whether a change in **[visitation]** would be in the best interests of the child." Visidides v. Derr, 3 Va. App.

69, 70, 348 S.E.2d 40, 41 (1986) (citation omitted)." [Emphasis added]

"Nevertheless, in Etter v. Etter (unpublished) ___ Va. App ___, __ S.E.2d ___ (1998), the Court of Appeals quoted Visidides v. Derr, 3 Va. App, 69, 70, 348 S.E. 2d 40, 41(1986) as follows:

"The standard to be applied to modification of child custody is well settled:

"A trial court, in determining whether a change of **custody** should be made, must apply a two-prong test: (1) whether there has been a [material] change in circumstances since the most recent **custody** award; and (2) whether a change in **custody** would be in the best interest of the child." Wilson v. Wilson, 18 Va. App. 193. 195.442 S.E.2d 694, 696 (1994) (quoting Visidides v. Derr, 3 Va. App, 69, 70, 348 S.E. 2d 40, 41(1986))." [Emphasis added]

"As recently as 1999, in Grymes V. Grymes ___ Va. App ___, __ S.E.2d ___ (1999) the Court of Appeals quoted the Visidides v. Derr, 3 Va. App, 69, 70, 348 S.E. 2d 40, 41(1986) as follows:

"The standard to be applied to modification of child custody is well settled:

"A trial [judge], in determining whether a change of **custody** should be made, must apply a two-prong test: (1) whether there has been a [material] change in circumstances since the most recent **custody** award; and (2) whether a change in **custody** would be in the best interest of the child." Wilson v. Wilson, 18 Va. App. 193. 195.442 S.E.2d 694, 696 (1994) (quoting

Visidides v. Derr, 3 Va. App, 69, 70, 348 S.E. 2d 40, 41(1986))." [Emphasis added]

THE MOST IMPORTANT GIFT A MOTHER CAN GIVE A CHILD IS HIS FATHER

The most important gift a Mother can give a child is his Father. In view of this affirmation, the parties made a detailed three-page visitation schedule including an important opening statement as follows:

VISITATION

RECOGNIZING THE IMPORTANCE OF VISITATION, THE PARENTS AGREE TO THE FOLLOWING:

Weekends: With father, every other weekend after school on Friday to Sunday 7:00 pm

Mid-week: With father, one evening per week after school to 8:00 A.M. the following day.

To be agreed on in advance. (J.A. p. 29-31)

[Partial Reproduction in Appendix]

REASONABILITY

The best interest of the child is paramount, but in this case, the Court disregarded the "Reasonability" test. In Sydnor Pump & Well Co. v. Taylor, 201 Va. 311, 317-18, 110 S.E.2d 525, 530(1959) the Supreme Court of Virginia stated, "In ordinary use and common acceptance, the word "reasonable" means fair; just; ordinary or usual; not immoderate or excessive; not capricious or arbitrary. It means what is just, fair and suitable under the circumstances."

This is not a custody case. The issue in this case is to return four mid-week overnight visitations per month to

his Father, or only 13% of Johnny's month (4 Days / 30 days) for a boy who is almost eleven years old. It is reasonable and in the best interest of Johnny to allow him to see his father 13% more! A "Reasonable Test" requires Johnny to be with his Father on the four mid-week overnight visitations per month.

THE COURT OF APPEALS ERRED BY DISREGARDING REASONABILITY, AND NOT FOLLOWING THE ESSENTIAL FINDINGS OF EICHELBERGER V. EICHELBERGER

The Court of Appeals erred by disregarding reasonability, and not following the findings of Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986). In Eichelberger, the custodial mother did not have the right to restrict visitation activities between the noncustodial father and child. The noncustodial father had allowed their 8-year-old son to ride a mini trail bike on the father's farm. The Court held that in the absence of a finding that the activity presented a danger to the child or otherwise affected the child's welfare, the trial court applied an incorrect standard.

The Eichelberger decision went on to say:

> "The relationship between a child and non-custodial parent should not be subject to the dictates of the custodial parent unless circumstances justify placing restrictions or conditions on the visitation privileges. Each case may require a court to exercise considerable judgement in placing conditions upon the frequency, duration, place, and extent of visitation, depending upon such factors as the age, relationship, emotional and physical condition of the child or parent; the parents' maturity and ability to responsibly care for a child; the location, availability and desires of the

child and parents - to list but a few. A change in circumstances may necessitate either a complete change in custody, modification of joint or split custody arrangements, or the imposition or removal of conditions on either the rights or responsibilities of a non-custodial parent.

"But, when visitation privileges have been liberally granted without restriction, absent a finding by the court that the non-custodial parent has acted without concern for the child's well-being or best interest, has demonstrated irresponsible conduct, has interfered with basic decisions in areas which are the responsibility of the custodial parent, or finding that the activity which is questioned by the custodial parent presents a danger to the child's safety or well-being, neither the custodial parent nor the court may intervene to restrict activities during visitation. (Emphasis added)

Ms. Cohen, as custodial parent, terminated Mr. Goldhamer's mid-week overnight carryover visitation because she did not like what she thought he was telling Johnny. (J.A. p. 224, lines 3-4) The parties have joint legal custody, and Ms. Cohen dictated Mr. Goldhamer's visitation without justification. This is an abuse of custodial discretion and Mr. Goldhamer's and Johnny's Constitutional rights! The trial court and Court of Appeals failed to recognize this abuse of discretion and the case should be overturned on the mid-week overnight visitation issue.

PREFERENCE OF THE CHILD

Sargent v. Sargent, 20 Va. App. 694, at 701, 460 S.E.2d 596 at 599 (1955) requires that all factors outlined in Code 20-124.3 be considered. Code 20-124.3 states in part:

"7. The Reasonable Preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference."

Johnny was subpoenaed to appear before Judge Tidey for the Circuit Court trial scheduled February 23, 1998. Opposing counsel filed a Motion to Quash the subpoena. The Judge ruled by telephone that he did not want to meet with Johnny until after the hearing. Judge Tidey never met Johnny, nor did he have the opportunity to hear Johnny express his reasonable preferences. Mr. Goldhamer wanted the judge to hear Johnny's preferences.

Dr. Adelaide Simpson, Ph.D., a licensed clinical psychologist, testified about mid-week overnight visitation with his father. Dr Simpson said, "I don't see any reason [why Johnny should not have mid-week overnight visitation with his Father]. He seems very adaptable. I gather he did fine with it when it was in operation previously. And he seems to want to have overnight visits with his Dad." (JA 211-212)

Johnny and his father enjoyed overnight mid-week visitation twice a week when Mr. Goldhamer was in town, for over eighteen months. Ms. Cohen cut off the "Carryover" mid-week visitation when Mr. Goldhamer asked for financial information as required in the separation agreement. (J.A. p. 311). (J.A. p. 224, lines 5-10) It was reasonable for Mr. Goldhamer to ask to exchange financial information, but more importunately, it was not reasonable for Ms. Cohen to hurt both Johnny and his father by reducing visitation. (J.A. pp. 32-34). (J.A. p. 225, lines 14-15)

EXPERT PSYCHOLOGICAL TESTIMONY

Dr. Crowley's notes provided: "I said to him [Mr. Goldhamer] that it was my job to come up with a visitation plan that I thought was in Johnny's best interests..." (J.A. p. 164) Dr. Crowley did not decide to re-write the visitation by himself. Ms. Cohen's attorney Scott Word had recommended Dr. Crowley. (J.A. p. 159) The family currently had a valid working visitation plan in effect--Mr. Goldhamer was shocked at Dr. Crowley's statement.

When Ms. Cohen cut off the mid-week carryover visitation, Mr. Goldhamer had no choice but to file a Motion to Amend or Review with the Henrico County Juvenile and Domestic Relations District Court, to get his carryover visitation back. He filed the next day. (J.A. pp. 35-40) Dr. Crowley was biased in his testimony recommending no carryover overnight mid-week visitation and no mid-week overnight visitation at all.

Dr. Adelaide Simpson, Ph.D., indicated that she did not see any reason Johnny should not have mid-week overnight visitation with his father. (J.A. p.211, line 22)

FEDERAL WELFARE REFORM ACT OF 1996, PUBLIC LAW SUBTITLE 1 (42 USC SEC. 669B) ENHANCING RESPONSIBILITY AND OPPORTUNITY FOR NON-RESIDENTIAL PARENTS

The Federal Welfare Reform Act of 1996, Public Law Subtitle 1 (42USC Sec. 669b) Enhancing Responsibility and Opportunity for Non-Residential Parents, which authorized the Department of Health and Human Services, Office of Child Support Enforcement, to award grants to states for access to Visitation Programs. In general, it states:

> "The Administration for Children and Families shall make grants under this section to enable States to

> establish and administer programs to support and facilitate noncustodial parents' access to and **visitation** of their children, by means of activities including mediation (both voluntary and mandatory), counseling, education, development of parenting plans, **visitation enforcement** (including monitoring, supervision and neutral drop-off and pickup), and development of guidelines for visitation and alternative custody arrangements. [Emphasis added]

The federal government is concerned that states are not encouraging parents to continue visitation with their children. In Virginia, the Virginia Department of Social Services, Division of Child Support Enforcement, administers this program.

TWO OF THE THREE BRANCHES OF VIRGINIA GOVERNMENT PROMOTE, SUPPORT AND ENCOURAGE A PARENT'S VISITATION WITH THEIR CHILDREN.

Two of the Three Branches of Virginia Government promote, support and encourage a parent's visitation with their children. In the Executive Branch of Virginia Government, the Governor stated:

> "The Virginia Fatherhood Campaign is one of several programs proposed by the Governor's Commission of Citizen Empowerment (1994) to enhance the personal responsibility individuals take for their actions, their children, and their future." (http://www.state.va.us) [Emphasis added]

In September 1999, Governor Gilmore hosted the Right Choices for Youth Conference in Richmond. In a speech Governor Gilmore said:

"The Virginia Fatherhood Campaign, also in the Department of Health, began as a recommendation of the Governor's Commission on Citizen Empowerment in 1995. Looking at research findings such as 70% of hard core criminals grow up without a father and that children in single-parent families are 150% more likely to become pregnant and have babies out-of-wedlock, the Commission recognized that something needed to be done. The Fatherhood Campaign has sought to improve social and health outcomes of children by getting fathers involved with their children, keeping fathers involved with their children, and improving parenting skills of fathers." [Emphasis added]

"The accomplishments of programs like the Virginia Abstinence Initiative and the Virginia Fatherhood Campaign show that strategic state programs can make a difference and foster an environment for children to make right choices." The Official Web site of The Commonwealth of Virginia. (http://www.state.va.us). [Emphasis added]

In the Legislative Branch of Virginia Government, the General Assembly offered Senate Joint Resolution No. 135, in January 2000, Requesting the Family Law Section of the Virginia State Bar to study fathers' rights, but was killed in committee by the Patron. The resolution stated in part:

WHEREAS, fathers are of vital importance in the development of children; and

WHEREAS, because of the rising divorce rate and the number of children born to unmarried parents, many of the Commonwealth's children do not live with their fathers; and

WHEREAS, many fathers desire to remain actively involved in the lives of their children, regardless of their marital status; and

WHEREAS, children need emotional and financial support from each of their parents; and

WHEREAS, some child advocates suggest that enhanced contact with the non-custodial parent encourages and enhances not only the child's physical and emotional well-being, but also his financial well-being; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Family Law Section of the Virginia State Bar be requested to study the rights of fathers in the areas of (i) divorce settlements, (ii) child support, (iii) child visitation, (iv) child custody, and (v) alimony, and to determine whether changes in the law are needed to enhance and encourage the father-child relationship. (http://www.state.va.us) [Emphasis added]

The Judicial Branch of Virginia Government continues to reduce a non-custodial parent's Constitutional Right to visitation, even if reasonable, by continuing to follow a policy of established precedent.

FEDERAL WAIVERS OF CHILD SUPPORT TO PROMOTE RESPONSIBLE FATHERHOOD

As recently as March 2000, Vice President Gore announced:

"[T]hat Health and Human Services (HHS) Secretary Donna Shalala has approved waivers in ten states to promote responsible fatherhood by helping more fathers provide emotional and financial support to their children. The waivers are part of a

demonstration project that aims to help young, low-income, never-married fathers obtain employment, make child support payments and learn parenting skills." (http://www.npr.gov/library/news) [Emphasis added] [Reproductions located in Appendix]

EXAMINATION OF APPELLANT'S BRIEF ON VISITATION

Appellant's Brief detailed eleven important reasons for the Court of Appeals to return the four mid-week overnight visitations per month to Mr. Goldhamer and Johnny, and we ask the court to examine these significant issues. (Brief of Appellant pp. 4 – 22)

MID-WEEK OVERNIGHT VISITATION CONCLUSION

In conclusion, there was no material change in circumstances that would require a change in the parties' visitation agreement after being in effect for over 18 months. Johnny (almost eleven years old) had a preference to spend mid-week overnight visitation with his father that the Court ignored. Ms. Cohen interfered with Mr. Goldhamer's Constitutional Right to visitation without reasonable cause, and the Court took away the entire mid-week overnight visitation, although Ms. Cohen never requested this. The four mid-week overnight visits per month are reasonable and a small but precious amount of time for Johnny to spend with his Father. Mr. Goldhamer and Johnny's "Substantial Constitutional Rights" as parent and child have been violated and their mid-week overnight visitation with each other was eliminated without Ms. Cohen or her attorney requesting it, and without a compelling reason. Appellant's brief detailed eleven important reasons for the Court of Appeals to return the four mid-week overnight visitations per month to Mr.

Goldhamer and Johnny, and we ask the court to examine these issues. (Brief of Appellant pp. 4 – 22) Mr. Goldhamer asked that the decision eliminating his mid-week overnight visitation be reversed, and remanded.

ATTORNEY'S FEES IN THE CIRCUIT COURT

The Court of Appeals affirmed the judge's decision not to award attorney's fees without explanation. This is error. The Court of Appeals of Virginia did not give any reasons why they ruled against attorney fees. The Circuit Court did not explain its ruling, either. The Separation Agreement dated January 31, 1996, (J.A. p.13) stated:

21. Attorney Fees ...If either party should **breach** any provision of this Agreement, the party in breach shall pay all of the others reasonable attorney's fees, costs and incidental expenses resulting from such breach. [Emphasis added] (J.A.p. 13, paragraph 21) [Partial Reproduction in Appendix]

Black's Law Dictionary defines a breach as breaking or violating a law, right, obligation, engagement, or duty, by either commission or omission. [It] exists where one party to a contract fails to carry out the term, promise, or condition of the contract. [Emphasis added]

The Uniform Commercial Code, Title 8 of the Code of Virginia, provides guidance in that a letter of credit resembles the current situation. Mr. Goldhamer had to rely on Ms. Cohen's financial information to calculate and pay her the correct dollar amount of child support. Ms. Cohen wrongfully misrepresented her income thereby repudiating or eliminating her own obligation to pay child support under the guidelines, and forcing Mr. Goldhamer to pay her more money.

Section 8.5A-102 of the 1950 Code of Virginia, as amended, defines a letter of credit as:

10. "Letter of credit means a definite undertaking that satisfies the requirements of § 8.5A-104 by an issuer to a beneficiary at the request or for the account of an applicant.

Section 8.5A-111, of the 1950 Code of Virginia, as amended, Remedies, goes further by stating:

"(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation....

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this title." [Emphasis added]

Ms. Cohen breached the parties' Separation Agreement (J.A. p. 13, paragraphs 20 and 21) by refusing to exchange all her current income information by February 15. This made it impossible to determine if a change in the child support obligation was necessary. (J.A.p.13) Mr. Goldhamer had to take Ms. Cohen to court to get the information.

Ms. Cohen wrongfully misrepresented her income thereby repudiating or eliminating her own obligation to pay child support under the guidelines, and forcing Mr. Goldhamer to personally pay her more money. (J.A. page 310, Ms. Cohen said, **"So, the best estimate of my total income for 1997 is $33,716.10.) (J.A. page 306, Ms. Cohen's actual income for 1997 was $125, 212.)**

Although Ms. Cohen had breached the Separation Agreement, the trial court and the Court of Appeals abused their discretion in not awarding Mr. Goldhamer attorney's

fees and costs, without any explanation. To date, after February 15, 2000, Ms. Cohen has yet to comply with the separation agreement by submitting all her financial income information and tax information for 1998, 1999, and a 2000 pay check stub to Mr. Goldhamer. Mr. Goldhamer always has provided Ms. Cohen with copies of his paycheck stub and tax information as required by their agreement.

In conclusion, the parties' Separation Agreement provides for a remedy if the agreement is breached, and it is reasonable to enforce the agreement, and award attorney's fees and costs to Mr. Goldhamer. Not awarding attorney's fees and costs cuts the heart out of the authority and weight of the Separation Agreement, and makes it impossible to enforce wrongful actions by a party. Therefore, Appellant moves that the Court award attorney's fees and costs to Appellant in the Circuit Court.

ATTORNEY'S FEES AND COSTS IN THE COURT OF APPEALS OF VIRGINIA

Mr. Goldhamer won the issue on the calculation for child support in the Court of Appeals. Mr. Goldhamer asked for attorney's fees and costs in the Court of Appeals. The Court of Appeals denied his request without stating a reason.

Since the judge erred by only including the salaries of the parities in computing child support, and that decision was reversed by the Court of Appeals, Appellant is entitled to attorney fees and costs associated with the appeal.

To not award attorney's fees and costs in the Court of Appeals, sends a message to parents that if they misrepresent their income, they will not have to pay litigation expenses even if provided in a separation agreement.

Appellant's timely Verified Bill of Costs totaling $998.99, pursuant to Rule 5A:30, was filed with the Clerk of

the Court of Appeals within ten days of the opinion with the Court of Appeals on March 17, 2000. The Court of Appeals has never responded. Therefore, we ask the Court to award attorney's fees and costs for the case that was in front of Court of Appeals of Virginia.

ATTORNEY'S FEES AND COSTS IN THE SUPREME COURT OF VIRGINIA AND THE SUPREME COURT OF THE UNITED STATES

Considering the Virginia Courts abuse of discretion, the Appellee's elimination of a parent's Constitutional Right, and unwillingness to reasonably resolve the visitation issue we ask for attorney's fees and costs in these courts.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

There are numerous reasons for the Supreme Court of the United States to grant a Writ of Certiorari.

The issue was preserved and timely raised in the Circuit Court of the County of Henrico, so that the trial judge could rule intelligently to avoid unnecessary appeals, in conformity with and as required by Rule 5:25 of the Rules of Virginia Supreme Court. Thus, based on state procedures, and the Rules of the Supreme Court of the United States the issue was raised and passed giving the Supreme Court of the United States jurisdiction to review the judgement.

Both of the Virginia appellate courts denied discretionary review on the constitutionality of visitation. The Supreme Court of Virginia denied Appellant's Petition for Rehearing on July 21, 2000, and Appellant's Petition for Appeal was denied on June 22, 2000, which was the state court of last resort. The Court of Appeals of Virginia, denied Appellant's Petition for Rehearing and Suggestion for Hearing En Banc, on April 25, 2000.

Over fifty percent of all U.S. marriages end in divorce. Over thirty percent of children live with a single parent. The constitutional rights of parental visitation must be addressed by the Supreme Court of the United States!

In the year 2000, our laws and rulings must reflect the future for America's parents and children. We can no longer hold on to court decisions made over fifty years ago or even as recent as fifteen years ago that deprive a Father of Constitutional visitation with his son or daughter for no compelling reason! Nevertheless, the Judicial Branch of Virginia Government continues to reduce a non-custodial parent's visitation, even if the visitation is reasonable, by continuing to follow only a policy of prior established precedent based on antiquated beliefs.

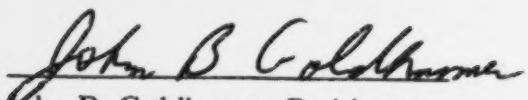
These are questions that must be resolved for non-custodial parents, namely the Fathers of America. Since the Supreme Court of Virginia is unwilling to address these important issues for the future, it rests with the Supreme Court of the United States to make the right decision, and help the youth of America!

CONCLUSION

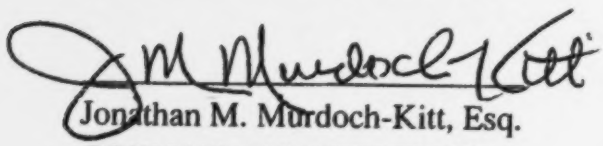
Mr. Goldhamer and son Johnny's "Substantial Constitutional Rights" as parent and child have been violated and the mid-week overnight visitation with each other was eliminated by the Respondent, Ms. Cohen, and the courts without a compelling reason.

We have demonstrated the importance of this issue to all non-custodial parents in the United States, and conclude that "Father and Child's Constitutional Rights" must be addressed by the Supreme Court of the United States, and ask that the Petitioner's Petition for Writ of Certiorari be granted.

Respectfully submitted:



John B. Goldhamer, Petitioner



Jonathan M. Murdoch-Kitt, Esq.
COUNSEL FOR PETITIONER

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Virginia State Bar ID 14179
Supreme Court of the United States,
Admitted June 13, 1986

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 7th *day of* September, 2000.

John B. Goldhamer, Appellant,

against Record No. 001089
Court of Appeals No. 1916 – 98 - 2

Deborah E. Cohen, Appellee.

From of the Court of Appeals of Virginia

On August 17th, 2000 came the Appellant, by counsel, and filed a petition for this court to remand a portion of this case to trial court.

On consideration whereof, the petition is denied

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 21st *day of* July, 2000.

John B. Goldhamer, Appellant,

against Record No. 001089
Court of Appeals No. 1916 – 98 - 2

Deborah E. Cohen, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the applicant to set aside the judgment rendered in here and on the 22nd day of June, 2000 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Lemons took no part in the consideration of this case.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 22nd *day of* June, 2000.

John B. Goldhamer, Appellant,

against Record No. 001089
Court of Appeals No. 1916 – 98 - 2

Deborah E. Cohen, Appellee.

From of the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-styled case.
Code Section § 17.1-410 (A) (3) and (B) .

Justice Lemons took no part in the consideration of this case.

A Copy,

Teste:
David B. Beach, Clerk
By:
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 25th day of April, 2000.

John B. Goldhamer, Appellant,

against Record No. 1916 – 98 - 2
Circuit Court No. CH97JA-1346

Deborah E. Cohen, Appellee.

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the applicant to set aside the judgment rendered herein on the 7th day of March, 2000 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17.-402 (D), recodifying Code § 17-681 16.02 (D) .

A Copy,
Teste:
Cynthia L. McCoy, Clerk
By:
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 25th *day of* April, 2000.

John B. Goldhamer, Appellant,

against Record No. 1916 – 98 - 2
Circuit Court No. CH97JA-1346

Deborah E. Cohen, Appellee.

Upon a Petition for Rehearing

Before Judges Elder, Frank and Senior Judge Hodges

On consideration of the petition of the applicant to set aside the judgment rendered herein on the 7th day of March, 2000 and grant a rehearing thereof, the said petition is denied.

A Copy,
Teste:
Cynthia L. McCoy, Clerk
By:
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 7th *day of* March, 2000.

John B. Goldhamer, Appellant,

against Record No. 1916 – 98 - 2
Circuit Court No. CH97JA-1346

Deborah E. Cohen, Appellee.

From the Circuit Court of Henrico County
Before Judges Elder, Frank and Senior Judge Hodges

For reasons stated in writing and filed with the record, the Court is of opinion there is error in part in the judgment appealed from. Accordingly, those part of the judgment pertaining to the elimination of midweek overnight visitation and the decision not to award attorney's fees are affirmed. That part of the judgement pertaining to the computation of appellee's income is reversed and annulled and the matter is remanded to the trial court for determination of appellant's child support obligation in accordance with the views expressed in written opinion of this Court. Upon remand, the trial court shall consider appellant's request for an award of costs.

This order shall be certified to the trial court .

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Deputy Clerk

MARCH 7, 2000

Record No. 1916-98-2

JOHN B. GOLDHAMER

v.

DEBORAH E. COHEN

FROM THE CIRCUIT COURT OF HENRICO COUNTY

George F. Tidey, Judge

Present: Judges Elder, Frank and Senior Judge Hodges

Argued at Richmond, Virginia

Jonathan M. Murdoch-Kitt for appellant.

Thomas Scott Word, III (Matthew N. Ott, P.C., on brief), for appellee.

OPINION BY JUDGE ROBERT P. FRANK

John B. Goldhamer (appellant) appeals the chancellor's decisions to eliminate appellant's midweek overnight visitation with the parties' child, to calculate appellant's child support obligation based on the parties' salaries rather than their gross income, and to disregard appellant's request for attorney's fees and costs. Appellant asserts that the trial judge

erred in: 1) eliminating appellant's midweek carryover visitation and midweek overnight visitation with the parties' child; 2) disregarding evidence that the child's bowel problems began when appellant's visitation was reduced; 3) disregarding the testimony of Dr. Simpson; 4) disregarding evidence that the child completes his homework under the supervision of a teacher at the after-school daycare center; 5) disregarding evidence that appellant has lived in his home for twenty-two years and that the child grew up in appellant's home; 6) ignoring evidence that the child had a history of two midweek overnight visits per week when appellant was in town; 7) disregarding evidence that appellee reduced appellant's midweek visitation with the child without explanation and in violation of an oral agreement; 8) disregarding evidence that appellee would not explain the midweek visitation reduction to the child; 9) disregarding evidence that appellee eliminated the extra "parent duty" appellant provided for child in place of a babysitter; 10) disregarding evidence that appellee has been diagnosed with Obsessive Compulsive Disorder disease, which has affected the child; 11) excluding evidence from appellee's psychologist and appellant's psychologist that people with food addiction can be addicted to other things, including the love of a child or a relationship with a child; 12) ignoring evidence showing appellee's salary, bonus, and stock grant; 13) omitting appellee's passive income as reported on her 1997 federal income tax return; 14) failing to refund appellant the excess child support he paid to appellee; 15) excluding evidence of appellee's gift and trust income; 16) accepting appellee's estimated income for 1997 as $33,716.10 when the evidence showed her income was $125,212; 17) misclassifying on-going pure trust income as a

one-time inheritance; 18) disregarding appellee's evidence that financial transactions between appellee and her father and her father's trust were not "arm's length" transactions; and 19) disregarding appellant's request for attorney's fees and costs. We affirm the chancellor's decision as to visitation and reverse and remand the chancellor's determination of child support.

I. BACKGROUND

The parties separated in 1995, and the final decree of divorce was entered on October 15, 1996. They have one child, a son, who is now nine years old. The parents have joint custody, but the child's primary residence is with appellee. From the time of their separation, the parties followed their separation agreement (Agreement) concerning visitation. The Agreement schedule gives appellant overnight visitation one night per week during the work week and weekend visitation every other weekend. Appellant is a tax auditor and is out of town on business approximately twenty-two weeks per year. Appellee permitted appellant to have two nights of midweek overnight visitation during the weeks when he was working in town, which allowed him the same amount of visitation as described in the Agreement. The parties refer to this as "carryover visitation." This arrangement was by oral agreement only. Appellee also asked appellant to care for the child on nights when she had meetings, appointments, or was out of town for work or medical treatment. The parties refer to this as "parent duty." The carryover visitation and parent duty arrangement ended in February 1997, allegedly when appellant inquired about appellee's 1996 financial information for the purpose of

calculating child support. The Agreement states that the parties shall exchange financial information on or before February 15 of each year.

On May 22, 1997, appellant filed a motion to amend or review the order for child support and visitation in the Henrico County Juvenile and Domestic Relations District Court. The juvenile and domestic relations district court amended the visitation schedule to eliminate appellant's midweek overnight visitation under the Agreement. Appellant was given one evening visitation with the child from after school until 7:00 p.m. during the work week. Under the Agreement, appellant paid $677 per month in child support. The juvenile and domestic relations district court ordered child support payments in the amount of $635 per month.

Appellant appealed to the Henrico County Circuit Court. The chancellor heard evidence from both parties, the child's treating psychologist, and an evaluative psychologist hired by appellant. The chancellor ruled that the midweek overnight visitation should be eliminated but extended appellant's evening visitation until 8:00 p.m. The chancellor ordered the child support amount to be based on the parties' "current income." While the record was not completely clear as to appellee's total assets, evidence in the record proved that, in addition to her salary, appellee received interest income from three interest-bearing accounts in 1996 and 1997, $9,500 from the Raymond Cohen Trust in 1996, $10,000 from the Leah Cohen Trust in 1996, $10,000 from the Leonard Lewis Trust in 1996, $6,110 from the Bernadine/Louis Silverman Trust in 1996, a $2,550 bonus

from her employer in 1997, overtime pay in 1997, $4,835 from the Raymond Cohen Trust in 1997, $750 from Raymond Cohen, individually, in 1997, a 1990 Honda Accord valued at $8,000 from Raymond Cohen, individually, in 1997, $68,343 from the Bernadine/Louis Silverman Trust in 1997, five shares of National Auto Supply Company stock from the Bernadine/Louis Silverman Trust in 1998, and 12.5 shares of stock in Russ Nixon Auto Parts, Inc. from the Bernadine/Louis Silverman Trust in 1998. The record also established that appellee has an Individual Retirement Account (IRA), a deferred compensation plan with her employer, and a mortgage from the Raymond Cohen Trust for her home with the principal amount of $87,000 at a fixed interest rate of 6.5%.

II. ANALYSIS

Appellant challenges the chancellor's decisions to eliminate midweek overnight visitation, to base appellant's child support obligation on the parties' salaries rather than on their gross income, and to disregard appellants request for attorney's fees and costs. We affirm the chancellor's elimination of the midweek overnight visitation and the chancellor's decision not to award attorney's fees. We reverse and remand for determination of appellant's child support obligation and consideration of appellant's request for costs.

Appellant's assignments of error one through eleven pertain to the chancellor's ruling on visitation. All of these assignments challenge the sufficiency of the evidence. We, therefore, consider these assignments of error together.

"In matters of custody, visitation, and related child care issues, the court's paramount concern is always the best interests of the child." Farley v. Farley, 9 Va. App. 326, 327-28, 387 S.E.2d 794, 795 (1990). "In matters of a child's welfare, trial courts are vested with broad discretion in making the decisions necessary to guard and to foster a child's best interests." Id. at 328, 387 S.E.2d at 795 (citing Eichelberger v. Eichelberger, 2 Va. App. 409, 412, 345 S.E.2d 10, 12 (1986)). "A trial court's determination of matters within its discretion is reversible on appeal only for an abuse of that discretion .... and a trial court's decision will not be set aside unless plainly wrong or without evidence to support it." Id. (citations omitted). In the determination of a change of visitation, the trial court "must apply a two-pronged test: (1) whether there has been a change in circumstances since the most recent [visitation] award, and (2) whether a change in [visitation] would be in the best interests of the child." Visikides v. Derr, 3 Va. App. 69, 70, 348 S.E.2d 40, 41 (1986) (citation omitted).

While the testimony was conflicting, sufficient evidence in the record supports the chancellor's decision. The evidence showed that the child began having problems with soiling himself. The child's treating psychologist testified that the midweek overnight visitation disrupted the child's schedule for "normal sleeping and waking, homework and other activities." The psychologist further stated that when a child shifts between two homes during the week, "it is destabilizing for them and it affects their school work, their social interaction as well as other basic bodily functions: eating, sleeping, and going to the bathroom." Thus, there was expert testimony from the child's treating psychologist

supporting the chancellor's determination that elimination of the midweek overnight visitation was in the best interests of the child. Finding ample evidence in the record to support the chancellor's decision that the best interests of the child would be achieved by eliminating the overnight midweek visitation, we will not disturb the chancellor's determination of this issue on appeal.

Appellant's assignments of error twelve through nineteen pertain to the chancellor's ruling on child support. We, therefore, consider these assignments together.

Code § 20-108.2(C) defines gross income for the purposes of determining child support as:

income from all sources, and shall include, but not be limited to income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits except as listed below, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans' benefits, spousal support, rental income, gifts, prizes or awards.

Appellant contends the chancellor computed appellee's gross income without considering the correct amount of appellee's salary, bonuses, stock grant, and passive income. We are unable to discern from the record the amounts the chancellor used in computing appellee's gross income. It is clear, however, that bonuses, stock grants, interest income, dividends, and capital gains are included as gross income pursuant to Code §20-108.2(C). Thus, on remand, the

chancellor must consider these amounts in computing appellee's gross income.

Appellant contends the chancellor did not consider appellee's gift income or inheritance in the computation of her gross income. Evidence in the record proved that appellee received gifts from the Raymond Cohen Trust, the Leah Cohen Trust, the Leonard Lewis Trust, and Raymond Cohen, individually. Appellee also testified that she received income from the Bernadine/Louis Silverman Trust, which she stated was an inheritance.[1]

The chancellor, in his opinion, stated, "I feel child support should be based on the current income of the parties. I did not use the past inheritance of Ms. Cohen because they are not to extend into the future." The chancellor's opinion apparently only considered the inheritance from the Bernadine/Louis Silverman Trust. He did not address the gifts from appellee's living relatives, which include the gifts from the Raymond Cohen Trust, the Leah Cohen Trust, the Leonard Lewis Trust, and Raymond Cohen, individually.

"Gifts" are included in the computation of gross income. See Code §20-108.2(C). A gift is property that is voluntarily transferred to another without compensation. See Black's Law Dictionary 696 (7th ed. 1999). A testamentary gift is a "gift made in a will." Id. at 697. For the purposes of computation of gross income under Code § 20-108.2(C), we hold that any inheritance is a gift, whether by will or intestate succession. We include transfers of property by intestacy as "gifts." We assume that the intestate heirs are the

intended donees because the decedent did not specify any other disposition of his or her property.

In this case, the chancellor ruled that the inheritance was not included in the gross income amount because it "would not extend into the future." Any type of gift is irregular income and, therefore, may or may not extend into the future. The statute clearly includes irregular income in the gross income computation because gifts, prizes, or awards are defined as gross income. See Code § 20-108.2(C). The chancellor's reasoning for not considering appellee's inheritance is contrary to the express language of the statute.

We hold that gifts, including inheritances, should be considered in the gross income computation.[2] If the application of the guidelines after including the gift is unjust or inappropriate, the chancellor may make written findings and deviate from the guidelines amount based on the statutory factors in Code § 20-108.1(B). Specifically, the chancellor may consider "other factors" in the determination of whether to deviate from the guidelines amount. See Code §20-108.1(B)(18). We hold "other factors" include, but are not limited to: whether the financial resources were used to reduce marital debt, enhance the marital estate or benefit any child; whether the asset is received with regularity; whether the asset is liquid; and whether the asset or property is income-producing. Therefore, the gifts to appellee from the Raymond Cohen Trust, the Leonard Lewis Trust, the Leah Cohen Trust, and Raymond Cohen, individually, should have been considered by the chancellor in computing appellee's gross income. Additionally, the inheritance, including the shares of stock, appellee received from the Bernadine/Louis

Silverman Trust should have been considered in the chancellor's computation of gross income.

Finally, appellant contends the chancellor erred in disregarding appellant's request for attorney's fees and costs. We find that the chancellor did not disregard appellant's request for attorney's fees but failed to rule on appellant's request for costs. The chancellor accepted appellant's exhibit regarding fees and costs at the June 8, 1998 hearing, and ruled that each party would be responsible for his or her own attorney's fees in his letter opinion dated June 11, 1998. We, therefore, remand this matter for consideration by the chancellor of appellant's request for costs.

III. CONCLUSION

For these reasons, we hold that the chancellor did not err in eliminating appellant's midweek overnight visitation with the parties' child, because credible evidence supports the chancellor's determination that the best interests of the child required a stable routine during the work week. We also hold that the chancellor erred in the computation of appellee's gross income. We remand this matter for computation of appellee's gross income pursuant to the views stated herein. Further, we hold that the chancellor did not disregard appellant's request for attorney's fees but failed to rule on the issue of costs. Therefore, we remand for consideration of an award for costs.

Affirmed in part, reversed in part and remanded.

Elder, J., concurring.

I concur in the result reached by the majority but write separately to clarify my view of the holding in Smith v. Smith, 18 Va. App. 427, 444 S.E.2d 269 (1994), discussed by the majority in footnote 2. I interpret Smith to hold that contemporaneous gains must be included in the gross income calculation and that non-contemporaneous capital gains ordinarily may not be included. See id. at 434, 444 S.E.2d at 274. Determining what income is contemporaneous is an issue for the trier of fact, depending on the circumstances of each case, subject to the appropriate standard of review on appeal. Income not received contemporaneously may nevertheless serve as a basis for deviating from the presumptive amount. See Code § 20-108.1(B).

FOOTNOTES:

[1] Appellee testified that this income was an inheritance. For the purposes of this opinion, we assume that this characterization is correct.

[2] In Smith v. Smith, 18 Va. App. 427, 434, 444 S.E.2d 269, 274 (1994), we held that the trial judge did not abuse his discretion in failing to include capital gains in the gross income computation where the realization of the capital gains was not contemporaneous with the support hearing and "[n]o income realized from the capital gain[s] remained as a liquid asset from which support could be paid." We also noted that the gains were "used to reduce marital debt or enhance the marital estate and presumably [were] taken into account" in the concomitant equitable distribution

proceeding. Id. Smith makes clear that contemporaneous capital gains should be included in the gross income computation. Determining what income is contemporaneous is an issue for the trier of fact, depending on the circumstances of each case, subject to the appropriate standard of review on appeal. However, we do not read Smith to hold that it would be error to include non-contemporaneous capital gains in the gross income computation. Deviation from the guidelines amount may be appropriate depending on the circumstances.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

DEBORAH E. COHEN, PLAINTIFF,
v. CHANCERY NO. CH 97JA1346-00
JOHN B. GOLDHAMER, DEFENDANT.

DEFENDANT'S EXCEPTIONS TO ORDER REGARDING VISITATION

COMES NOW THE DEFENDANT, John B. Goldhamer, in person and by Counsel, and for his exceptions to the decision of the Court in eliminating mid-week carryover visitation and limiting mid-week overnight visitation with the parties' eight year old son, in that the Order of the Court:

1. **Reduced the Defendant's right to visit with his son**; [Emphasis added]
2. Disregarded the testimony of Defendant's psychologist, Dr. Adelaide Simpson, Ph.D., and her professional opinion that mid-week overnight visitation was beneficial to the parties' child;
3. Disregarded evidence that the child completes his homework under certified teachers at the licensed daycare center after school;
4. Disregarded evidence that Defendant has lived for 22 years in his home that is also the child's boyhood home that the child grew up in, which is next to the child's best friends;

5. Ignored the evidence that the child had a history of 1.5 years of quality visitation of two mid-week overnight visits per week, when the Defendant was in town without incident;

6. Disregarded the evidence that Plaintiff suddenly and without explanation reduced the child's mid-week visitation with Defendant, and voided the oral agreement between the parties;

7. Disregarded the evidence that Plaintiff would not explain to the child why his visitation with the Defendant had changed;

8. Disregarded the evidence that Plaintiff also eliminated the extra "Parent Duty" the Defendant Father provided for the child in place of a paid sitter when Plaintiff had mid-week appointments;

9. Disregarded the evidence that Plaintiff is diagnosed with obsessive compulsive disorder disease, which effects the child;

10. Excluded the evidence that both Plaintiff's psychologist and Defendant's psychologist agreed that if a person is addicted to food and other things, they also could be addicted to a child, to the love of a child, or to a relationship with a child; and

11. Disregarded the evidence that the child's bowel problems started when the child saw Defendant less.

DEFENDANT'S EXCEPTIONS TO ORDER REGARDING CHILD SUPPORT

COMES NOW THE DEFENDANT, John B. Goldhamer, in person and by Counsel, and for his exceptions to the decision

of the Court in setting child support for the parties' eight year old son, in that the Order of the Court:

1. Ignored Defendant's Exhibit 2B. showing Plaintiff's 4/17/98 paycheck stub listing current gross earnings per year at $38,500., plus a bonus of $1,750. and a stock grant of $1,305. for a total yearly salary earnings of $41,555. Plaintiff has received this income for the entire time that she has been employed by her current employer;

2. Omitted Plaintiff's Passive income as reported in her 1997 Federal Income Tax Return, and partially listed in Defendant's Exhibit 6. showing the following income:

Regular Interest	$2,385.00
Tax Exempt Muni Interest	1,308.00
Dividends	898.00
Capital Gain	400.00
Total Yearly Passive Income	$4,991.00

(Plaintiff's 1998 total salary earnings, and passive income totaled $46,546.);

4. Disregarded Defendant's Exhibit On Overpaid Child Support listing surplus child support of $2,492. that should be refunded to Defendant;

5. Excluded evidence that 20-108.2 (C) of the Code of Virginia defines gross income for the calculation of child support to include Gifts, and Trust income, both of which were detailed in Defendant's Exhibit No. 3. and 4., totaling over $119,289 in 24 months;

6. Disregarded Defendant's Exhibit 8., Plaintiff's letter of February 21, 1997 to Defendant Stating: "So, the best estimate of my total income for 1997 is $33,716.10", when in fact Plaintiff's income was $125,212.00 for 1997, as shown enumerated in Defendant's Exhibit No. 6;

7. Incorrectly misclassified on-going pure trust income as one-time inheritance;

8. Disregarded Plaintiff's evidence that financial transactions between Plaintiff and her living Father and her Father's Trust Account, The Raymond Cohen Trust, were not "Arms Length Transactions"; and

9. Disregarded Defendant's [Plaintiff's] request for an award of attorney's fees and costs.

RESPECTFULLY SUBMITTED:

_____

John B. Goldhamer, Defendant

_____

Jonathan M. Murdoch-Kitt, Esq.
Murdoch-Kitt Professional Building
3217 Chamberlayne Avenue
Richmond, Virginia 23227-4806
(804) 321-5100 Fax (804) 321-8690
(e-mail) triallawyer@juno.com
Virginia State Bar ID 14179

CERTIFICATE

I certify that a true and correct copy of the foregoing was mailed, first class, postage prepaid, this **14th day of July, 1998**, to all counsel of record at their usual business addresses.

_____

Jonathan M. Murdoch-Kitt, Esq.

Joint Appendix pages 330, 331, & 332 Court of Appeals of Virginia [Emphasis and Clarification added]

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

DEBORAH E. COHEN, PLAINTIFF,
v. CHANCERY NO. CH 97JA1346-00
JOHN B. GOLDHAMER, DEFENDANT.

ORDER FOR VISITATION AND CHILD SUPPORT

THIS DAY, June 8, 1998, came the Plaintiff and the Defendant, in person and by counsel, upon Defendant's appeal from the Henrico County Juvenile and Domestic Relations District Court; upon Defendant's motion for a reduction in child support and reinstatement of midweek visitation; upon evidence heard ore tenus, and was argued by counsel for Plaintiff and Defendant.

IT IS ORDERED that the Defendant, John B. Goldhamer shall have mid-week visitation with the child of the parties, John Benjamin Goldhamer (D.O.B. 1/1/90), "Johnny", as follows: During the summer months while school is not in session, two times per month overnight, not in the same week. After Labor Day, mid-week visitation shall be one weekday evening during the weeks when Defendant is in town, from after school until 8:00 p.m. This schedule shall be established as far ahead as Defendant can obtain his work schedule. Additional mid-week visitation may be had by agreement of the parties. There shall be no discussion of expanded visitation with the child. All weekend and holiday visitation schedules shall remain as

previously ordered and outlined in the Parties' Agreement dated January 31, 1996.

IT IS ALSO ORDERED that based upon the current incomes of the parties Defendant shall pay to the Plaintiff the aggregate sum of $657.00 per month for the support and maintenance of the child. The first payment shall be made in July, 1998 on the scheduled dates and in the same manner previously agreed upon and ordered by this Court with the parties alternating paying the child daycare expenses directly and deducting the payments from their respective taxes in alternate years. Pursuant to Section 20-60.3 of the Code of Virginia (1950), as amended, the following information is made part of this decree:

1. Upon receipt of a notice of arrearages, support payment may be withheld as they become due pursuant to Section 20-79.1 or Section 20-79.2 of the Code of Virginia (1950), as amended, from earnings as defined in Section 63.1-250, without further amendments of this order or having to file an application for services with the Department of Social Services.

2. Support payments may be withheld pursuant to Section 63.1-249 et. seq. without further amendments to this order upon application for services with the Department of Social Services.

3. A duty of support is owed by Defendant to John Benjamin Goldhamer, Born January 1, 1990.

4. The parents of the child to whom a duty of support is owed are Deborah Cohen, d/o/b - May 30, 1952, 2205 Rocky Point Parkway, Richmond, Virginia 23233, Social Security Number: 311-60-1757, Place of employment: Crestar Bank, Point Parkway, Richmond, Virginia 23233; and John B. Goldhamer, d/o/b - July 31, 1951, 9407 Emmett

Court, Glen Allen, Virginia 23060, Social Security Number: 067-38-8038, Place of employment: Virginia Department of Taxation, Richmond, Virginia, 23220.

5. A petition may be filed for suspension of any license, certificate, registration or other authorization to engage in a profession, trade, business or occupation issued by the Commonwealth to a person responsible for support as provided in Section 63.1-263.1 upon a delinquency for a period of 90 days or more or in an amount of $5,000.00 or more. Neither Plaintiff nor Defendant has such a license.

6. Defendant shall pay directly to Plaintiff the aggregate sum of $657.00 per month as child support, payable on the first Saturday of each month beginning in July, 1998, less any child daycare payments paid directly by Defendant pursuant to the parties' agreement.

7. Defendant shall maintain health insurance coverage on the parties' minor child, as follows: Cost Alliance which is administered by Trigon; group policy Number 11161004, Identification Number YTV067388038. The parties shall share equally "extraordinary" uninsured medical expenses incurred on behalf of the child exceeding $100.00 for a single illness or condition.

8. The support obligation as it becomes due and unpaid creates a judgment by operation of law.

9. The parties are required to give each other and the Court thirty days written notice, in advance, of any proposed change of address pursuant to Section 20-124.5.

10. The Department of Social Services may initiate a review of the amount of support ordered by any Court pursuant to Chapter 13 of Title 63.1 and in accordance with Sections 20-108.2 and Section 63.1-252.2.

11. That upon a delinquency of a support payment for a period of 90 days or more, or in an amount of $5,000. or more, a petition may be filed to suspend or refuse to renew the delinquent obligor's license to operate a motor vehicle issued by the Commonwealth.

12. Pursuant to Section 20-79.2 et seq., the Court may Order the immediate withholding from an obligor's earnings for the amount of support ordered, plus payments to liquidate any arrearage. The Court herein having found no good cause for such an order, these provisions are waived.

13. That child support shall be payable until the child no longer is a full-time high school student, becomes self-supporting, ceases to live in the parent's home seeking or receiving child support, or reaches the age of nineteen (19) or graduates from high school, whichever first occurs.

This Court retains jurisdiction over future matters of custody, visitation, and child support ^ *for a period of six months.* The clerk is directed to furnish a certified copy of this Order to each counsel of record ~~and to remove this matter from the docket~~.

Enter: 7/23/1998

/s/ George F. Tidey

George F. Tidey, Judge

I Ask For This:

_____p.q.

Thomas Scott Word, III, Esq. vsb No. 27999
Matthew N. Ott, P.C.
1209 East Cary Street
Richmond, Virginia 23219
(804) 783-1902

Seen And Objected To:

_____p.d.

Jonathan M. Murdoch-Kitt, Esq.

VIRGINIA:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT OF COUNTY OF HENRICO

DEBORAH E. COHEN, PETITIONER.

v. CASE # 31445-02,03,04

JOHN B. GOLDHAMER, DEFENDANT.

IN RE: John Benjamin Goldhamer J- 4456602

ORDER

PRESENT: [MOTHER] [FATHER]

_/ Attested copy to *all parities*

*** ORDERED that the respondent pay the sum of *** See attached per _____ payable _____ beginning _____ to the Division of Child Support Enforcement, P.O. Box 570, Richmond Virginia 23204 who shall disburse the money according to law/Direct to _____.

_/ Visitation rights granted to *Father (J-44566-02)* as follows / ~~as set out in the attached visitation schedule which is hereby incorporated and made a part of this order~~.

amended to eliminate the mid-week overnight visitation. Father is to have evening visitation from after school until 7:00 pm on Thursday nights when he's not out of town on business.

All other visitation and custody provisions remain the same.

A-31445-02 Father's motion to amend support

See support order; Also all other insurance and support provisions remain the same.

A-31445-03 motion to Quash Subpoena Duces Tecum-denied

A-31445-04 motion for Discovery- denied.

Attorney's: A / E/ W Enter 10: / 15 /97

Scott Word – For Mother /s/ *A. Elisabeth Oxenham*

MOTION TO AMEND OR REVIEW ORDER

Henrico County Juvenile Court

[X] Juvenile and Domestic Relations District Court

John B. Goldhamer	In re/v.	Deborah E Cohen
Petitioner		Respondent
9407 Emmett Ct.		2205 Rocky Pt. Pky
Glen Allen Va 23060		Richmond, Va 23233
County Henrico 270-1100		County Henrico 740-5838

Requirements of Order

Final Decree of Divorce – Agreement and Stipulation - Schedule B. Visitation

Recognizing the Importance of Visitation, the Parents Agree to the Following:

Weekends: With father, every other weekend after school on Friday to Sunday 7:00 PM.

Midweek: With father, one evening per week after school to 8:00 AM the following day.
To be agreed upon in advance.

Holidays: Various holidays are equally split between Mother and Father

[X] The undersigned moves that the attached order be changed, amended, and /or modified as follows:

To Add The following Clause To The Agreement:

Other: When the Father is not able to spend time with the child as stipulated in the visitation agreement, a carry over will be allowed to an available time; but agreed upon in advance.
(See Attached Letter}

Child John Benjamin Goldhamer Birthdate 1/1/90

5/22//97 — */s/ John B. Goldhamer*
Petitioner

JOHN B. GOLDHAMER
9407 EMMETT COURT
GLEN ALLEN, VIRGINIA 23060
(804) 270-1100

May 22, 1997

Judge A. Elizabeth Oxenham,
Judge William G. Boice, or
Judge Robert J. Smith
County of Henrico
Juvenile and Domestic Relations District Court
4201 Parham Road
Richmond, Virginia 23273

Re: Deborah E. Cohen (Goldhamer) v. John B. Goldhamer
Chancery No. CH96-1071
Motion To Amend Or Review Order

Your Honors:

Enclosed please find two completed Motion To Amend Or Review Orders. One is to respectfully request a review of the calculation of child support, while the other is to courteously request a review of the visitation listed in Schedule B. of the Agreement and Stipulation, dated January 31, 1996.

Respondent Will Not Reveal **Total** Income For The Calculation of Child Support

Enclosed please find copies of letters dated February 1, and 23, 1997, addressed and signed by the Respondent; in which the Petitioner requested statements of all current income, as stipulated in Section 20. Child Support, of the Agreement and Stipulation, and in which gross income is defined in Section 20-108.2 of the **Code of Virginia.**

To this date, the Respondent has yet to comply. Without this substantial sum, the Petitioner was forced to use the best available information; namely salaries, and $100.00 of interest income to recalculate the child support payment.

Therefore, the Petitioner prays that the Court will require the Respondent to reveal all of the total income attributable to both 1996, and 1997 so that we can recalculate the proper child support.

Court Ordered Mediation

I pray the court will not order mediation until the Respondent's total income is presented to the Court. Otherwise, negotiations would be premature for an undisclosed amount.

In addition, the Petitioner personally knows one of the Dispute Resolution Center, Court Appointed Certified Mediators; who would have a conflict of interest in this case. Therefore, since nearly two years ago, the Respondent suggested engaging Mr. Jerry Bagnelle, as a mediator, I pray that the Court appoint him as our mediator for a future date; after the Respondent's total income is revealed.

Child Day Care Expenses

It is also prayed for the Court to accept the recalculation of child day care expenses as enumerated by daily computation and agreed upon by both the Respondent and Petitioner. Enclosed please find letters showing this accord.

Visitation

The Agreement and Stipulation states in part:

Schedule " B."

VISITATION

RECOGNIZING THE IMPORTANCE OF VISITATION, THE PARENTS AGREE TO THE FOLLOWING:

	Odd Years	Even Years
Weekends:	With father, every other weekend after school	Same as odd on Friday to Sunday 7:00 PM.
		Even Years same as odd years
Midweek:	With father, one evening per week after school to 8:00 AM the following day. To be agreed upon in advance.	
		Even Years same as odd years

Precedent For Almost Two Years

Although the agreement states once a midweek over night, the Respondent has been allowing a carry over of visitation to an appropriate week, for almost two years; so that the child stayed overnight with his Father on both Tuesday and Wednesday nights; when I am not traveling for my employer. As an employee of the Virginia Department of Taxation, I generally travel somewhere in the United States, every other week on Official State of Virginia Business. Enclosed is the Petitioner's business card, where I have worked for over twenty years.

Enclosed is a copy of the most recent letter from the Respondent, further limiting the Petitioner's visitation with the child to specifically either Tuesday or Thursday night; when I am in town. The Respondent has picked these nights

to save the cost of baby-sitting while visiting a Psychiatrist on Tuesday, and a Psychologist on Thursday.

It is the best interest of the child to experience overnight traditions in his boyhood home, with his Father, as much as possible. Therefore, I pray that the court will amend the visitation to add a clause allowing a carry over of visitation from the weeks the Petitioner is out of town on Official State of Virginia Business, to other available weeks as follows:

Other: When the Father is not able to spend time with the child as stipulated in the visitation agreement, a carry over will be allowed to an available time; but agreed upon in advance.

The Petitioner humbly prays for the above.

Thank you for the Courts relief.

Sincerely,

/s/ John B. Goldhamer

John B. Goldhamer

05-12-1997 10:56AM FROM SOUTH OFFICE MAR 6010
TO 93672975 P.01

Deborah Elise Cohen
2205 Rocky Point Parkway
Richmond, Virginia 23233
(804) 740 - 5838

Monday, May 12, 1997

Mr. John B. Goldhamer
9407 Emmett Court
Glen Allen, VA 23060

Dear John:

I have written a letter to Rainbow Station letting them know that you will be picking up Johnny on **either** Tuesday **or** Thursday evening. until further notice. I will let them know each Monday which you have chosen.

Johnny having overnight visitation with you on one of these nights will allow him to be cared for by a baby-sitter only one evening during most weeks instead of two.

Sincerely,

/s/ Deborah Elise Cohen

Deborah Elise Cohen

Copy to Thomas Scott Word III, Esquire

Post-It brand fax transmittal memo]
[To ***John Goldhamer*** **]**
[Fax ***367- 2975*** **]**

Deborah Elise Cohen
2205 Rocky Point Parkway
Richmond, Virginia 23233
(804) 740 - 5838

Friday, February 21, 1997

John B. Goldhamer
9407 Emmett Court
Glen Allen, VA 23060

Dear John,
I am including my documents needed in order for us to calculate if a change in child support is needed for 1997. I will also discuss visitation in this letter, since circumstances have changed due to my long hospital stay and upcoming business trips.

Child Support Calculations:
I have attached a copy of my most recent pay stub. Since I am paid 26 times per year, my gross annual salary is

26 x 1292.30 = $33,600 per year

I am on an annual review schedule now, and receive my raise, if any, each January. So I will not be making more that the above amount in 1997.

I have also attached a copy of my interest statements for 1996. It is Crestar Bank, Savings account: $116.10
So, but best estimate of my total income for 1997 is $33716.10.

Rainbow Station
The 2-page spread sheet you prepared is very good however, I found several errors, and have also estimated the costs for

Get Well and Snow Days for 1997. I am including a copy with the changes marked on it. As shown, the total estimate for Rainbow Station is $4104 which is $342 per month.

Visitation:

As you already know, I will be traveling out of town for business training for 5 ½ weeks during 1997, and there is the possibility of more business trips being scheduled. In addition, I was out of town, in the hospital, from January 19, 1997 through February 7, 1997.

I appreciate your taking care of Johnny during my out of town trips. I will continue to keep you "first choice" in caring for Johnny when I cannot. If you cannot either, then I will, of course, make other arrangements for his care.

Due to all the "extra days" you will be caring for Johnny while I'm out of town, there is no longer any need to "make up" the time when you are out of town. Therefore, starting now, we will follow the visitation specified in our agreement: every other weekend, and one night during the week, when you are in town.

I know you are concerned that I will not agree to your 3 weeks of a vacation time with Johnny this year due to the 3 weeks you took care of him during my hospital time. I am not going to consider the 3 weeks you cared for him as your vacation time with him, so it is fine with me for you to still take 3 weeks of vacation with him.

Sincerely

/s/ *Deborah*

Copy to: Thomas Scott Word, III Deborah Elise Cohen

AGREEMENT AND STIPULATION

THIS AGREEMENT AND STIPULATION ENTERED this *31st* day of *January*, 1996, by and between John B. Goldhamer ("HUSBAND") and Deborah C. Goldhamer ("WIFE").

WITNESETH:

Husband and Wife were lawfully married on October 24, 1987, in West Lafayette, Indiana.

Differences have arisen between Husband and Wife causing them to live separate and apart with intent to remain apart permanently, beginning August 19, 1995.

There is one child of this marriage, namely John Benjamin Goldhamer, born January 1, 1990.

Husband and Wife recognize that each have certain rights and obligations growing out of their marriage which they now desire to settle by mutual agreement;

NOW THEREFORE, in consideration of the mutual covenants, promises and agreements hereinafter contained and pursuant to Sections 20-107.3 (I) and 20-109.1 of the Code of Virginia 1950, as amended, Husband and Wife agree as follows:

20. Child Support: The monthly obligation of Husband as calculated and provided in the Guidelines contained in Virginia Code Sections 20-108.1 and 20-108.2 is $677.00, which includes the agreed upon direct payment by Husband of $380.00 for current child care expenses in the years he claims child dependency exemption (see paragraph 14 b.). Accordingly, recognizing his obligation to provide support and maintenance for his child and wishing to fulfill such, Husband agrees to pay directly to Wife the remaining sum of $297.00 per month for the support and maintenance of the

minor child of the parties continuing on the Saturday following the first day of September, 1995 and containing thereafter on the Saturday following the first of each successive month and to pay such amount as the parties may agree (as long as memorialized by Court Order) in accordance with the Guidelines or as thereafter determined by a Court of competent jurisdiction to be reasonable.

The obligation to pay child support shall continue to be paid for the child of the parties until the child (i) is no longer a full time high school student, (ii) becomes self supporting, (iii) ceases to live in the home of the parent seeking or receiving child support or (iv) reaches the age of nineteen (19) or graduates from high school, whichever of the preceding first occurs.

The parties further agree to exchange all their current income information including information regarding pay raises, on or before February 15 of each year, commencing in February of 1996, in an effort to determine if a change in the child support obligation is necessitated according to Virginia Code Sections 20-108.1 and 20-108.2.

21. Attorney Fees: Both parties agree and concede to the other that each has incurred and will incur in the future certain costs and attorneys fees in connection with preparation of this Agreement and Stipulation and with receipt for divorce. If either party should breach any provision of this Agreement, the party in breach shall pay all of the others reasonable attorney's fees, costs and incidental expenses resulting from such breach.

DCG /s/*DCG* JBG /s/*JBG*

19. Custody and Visitation: The happiness, welfare and best interest of the parties' child is the primary concern of Husband and Wife. The welfare of the child shall be the primary consideration as to all aspects of custody, child support and visitation.

The child shall continue to be in the joint legal custody of Husband and Wife. This means that major parental decisions affecting the child's growth and development shall be made jointly. The parties also agree regularly to advise one another in regard to all major matters related to the child. The principal residence of the child shall be with Wife. Husband shall have visitation rights with child according to Schedule "B" attached hereto.

Page 12 of 16 DCG /s/*DCG* JBG /s/*JBG*

Schedule " B."

VISITATION

RECOGNIZING THE IMPORTANCE OF VISITATION, THE PARENTS AGREE TO THE FOLLOWING:

Weekends: With father, every other weekend after school on Friday to Sunday 7:00 PM.

Midweek: With father, one evening per week after school to 8:00 AM the following day. To be agreed upon in advance.

Other: At such times and places as the mother and father mutually agree either in writing or orally.

Weekends may be combined with any holiday by agreement.

Both the mother and father agree to notify each other if the child is taken out of public or day care school early.

This visitation agreement may be changed with the consent of both parents. (J.A. p. 29-31)

THE WHITE HOUSE
Office of the Vice President

For Immediate Release, March 29, 2000

VICE PRESIDENT GORE ANNOUNCES CHILD SUPPORT WAIVERS TO PROMOTE RESPONSIBLE FATHERHOOD

Washington, D. C. – Vice President Gore announced today that Health and Human Services (HHS) Secretary Donna Shalala has approved waivers in ten states to promote responsible fatherhood by helping more fathers provide emotional and financial support to their children. The waivers are part of a demonstration project that aims to help young, low-income, never-married fathers obtain employment, make child support payments and learn parenting skills."

The project provides state-run child support enforcement agencies and community-based organizations, including faith based groups, the flexibility to promote responsible fatherhood and strengthen families through activities such as employment and education services, "team" parenting and building supportive relationships between parents, substance abuse and anger management services, awareness of domestic violence issues, transportation assistance, and establishment of paternity, in addition to regular child support enforcement services." (www.npr.gov/library/news) [Emphasis added]

FEDERAL WELFARE REFORM ACT OF 1996, PUBLIC LAW SUBTITLE 1 (42 USC SEC. 669B) ENHANCING RESPONSIBILITY AND OPPORTUNITY FOR NON-RESIDENTIAL PARENTS

§ 669 b.
Grants to States for Access and Visitation Programs

(a) In general. The Administration for Children and Families shall make grants under this section to enable States to establish and administer programs to support and facilitate noncustodial parents' access to and **visitation** of their children, by means of activities including mediation (both voluntary and mandatory), counseling, education, development of parenting plans, **visitation enforcement** (including monitoring, supervision and neutral drop-off and pickup), and development of guidelines for visitation and alternative custody arrangements.... [Emphasis added]

1999 Right Choices for Youth Conference

Executive Summary

In September 1999, Governor Gilmore hosted the Right Choices for Youth Conference in Richmond to provide an opportunity for individuals and organizations throughout Virginia to come together and talk about how families and communities can help youth make the right choices for their futures. The central theme of the conference revolved around helping youth avoid five risk behaviors: Alcohol, drugs, sex, tobacco, and violence....

The Virginia Fatherhood Campaign, also in the Department of Health, began as a recommendation of the Governor's Commission on Citizen Empowerment in 1995. Looking at research findings such as 70% of hard core criminals grow up without a father and that children in single-parent families are 150% more likely to become pregnant and have babies out-of-wedlock, the Commission recognized that something needed to be done. The Fatherhood Campaign has sought to improve social and health outcomes of children by getting fathers involved with their children, keeping fathers involved with their children, and improving parenting skills of fathers. The accomplishments of programs like the Virginia Abstinence Initiative and the Virginia Fatherhood Campaign show that strategic state programs can make a difference and foster an environment where children to make right choices. (www.state.va.us). [Emphasis added]

SENATE JOINT RESOLUTION NO. 135

Offered January 21, 2000

Requesting the Family Law Section of the Virginia State Bar to study fathers' rights.

Patron - Hanger

Referred to Committee on Rules

WHEREAS, fathers are of vital importance in the development of children; and

WHEREAS, because of the rising divorce rate and the number of children born to unmarried parents, many of the Commonwealth's children do not live with their fathers; and

WHEREAS, many fathers desire to remain actively involved in the lives of their children, regardless of their marital status; and

WHEREAS, children need emotional and financial support from each of their parents; and

WHEREAS, some child advocates suggest that enhanced contact with the non-custodial parent encourages and enhances not only the child's physical and emotional well-being, but also his financial well-being; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Family Law Section of the Virginia State Bar be requested to study the rights of fathers in the areas of (i) divorce settlements, (ii) child support, (iii) child visitation, (iv) child custody, and (v) alimony, and to determine whether changes in the law are needed to enhance and encourage the father-child relationship.

Technical assistance shall be provided by the Division of Child Support Enforcement. All agencies of the Commonwealth shall provide assistance for this study, upon request.

The Family Law Section of the State Bar shall complete its work in time to submit its findings and recommendations to the Governor and the 2001 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents." (http://www.state.va.us) [Emphasis added]

Note:
Senate Joint Resolution No. 135 killed in committee by Patron

AMICUS CURIAE

BRIEF

MOTION FILED
DEC 4 - 2000

DEC 4 2000

No. 00-707 (2)

In The Supreme Court of the United States

JOHN B. GOLDHAMER,

Petitioner,

v.

DEBORAH E. COHEN,

Respondent.

AMICUS CURIAE BRIEF OF CHILDREN'S RIGHTS COUNSEL IN SUPPORT OF PETITIONER

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23 pp

THE UNITED STATES SUPREME COURT

JOHN R. GOLDHAMER	*	
	*	
Petitioner	*	
	*	
v.	*	
	*	No. 00-707
DEBORAH E. COHEN	*	
	*	
Respondent	*	

MOTION FOR LEAVE TO FILE AN *AMICUS* BRIEF

The Children's Rights Council (CRC) moves for leave to file an *amicus* brief over the refusal to consent to the filing by the Respondent. Petitioner has agreed to the filing. Counsel for the CRC contacted Respondent's counsel, Nancy Cook, Esquire to get consent for the filing. Ms. Cook told CRC counsel that Respondent was not going to respond to the Petition for Writ of Certiorari and had no position on the amicus filing. CRC counsel took this as refusal to consent.

Amicus should be given leave to file because the CRC as a staunch defender of children's rights can give this Court a perspective different from that of the two litigants and can be a voice for the most important person involved in this litigation, the parties' child, Johnny Goldhamer.

THE CHILDREN'S RIGHTS COUNCIL
By Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

***AMICUS CURIAE* BRIEF OF**

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IN THE

SUPREME COURT OF THE UNITED STATES

PARITIES TO THE PROCEEDING

John B. Goldhamer, **Petitioner,**
9407 Emmett Court
Glen Allen, Virginia 23060

v.

Deborah E. Cohen, **Respondent.**
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Supreme Court of the United States
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INTEREST OF AMICUS

The Children's Rights Council (CRC) is a non-profit organization dedicated, *inter alia*, to the preservation and protection of the rights of children in litigation and other areas of conflict. The CRC has filed numerous *amicus* briefs in various state and federal courts in the United States. It is a lodestar of the CRC's philosophy that children need the loving care and nurture of both parents, particularly when the family is fractured by divorce.

The CRC after a careful study of the record in this matter believes that this case unfortunately is paradigmatic of a growing number of child visitation cases where the custodial parent backed by the power of the state judiciary punishes the non-custodial parent for something that that parent did which irks or angers the custodial parent. In this case, the precipitating event was Goldhamer's request of documents relating to Cohen's finances for the recalculation of child support as provided in the parties Separation Agreement. The state has given the custodial parent immense power to wreck vengeance on the non-custodial parent by striking at the non-custodial parent's time with his child.

ARGUMENT

THE PARENT-CHILD RELATIONSHIP IS A PREFERRED CONSTITUTIONAL RIGHT THAT IS GROUNDED ON EMOTIONAL ATTACHMENTS THAT CAN ONLY BE DEVELOPED THROUGH VISITATION BETWEEN THE NON-CUSTODIAL PARENT AND HIS CHILD

The relationship between a parent and his/her child is constitutionally protected. *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This right to family integrity or parental autonomy is grounded in the First Amendment's broad right of association and the Fourteenth Amendment's general substantive due process protections. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-20 (1984); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

This Court has characterized a "parent's right to the companionship, care, custody, and management" of his/her child as "far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1952). In the panoply of constitutional rights then, this fundamental right to raise one's child free of state intervention, is eclipsed only by the First Amendment.

The Court has also held that "freedom of choice in matters of family life is a fundamental liberty interest" protected by the United States Constitution through the Fourteenth Amendment. *Santosky v. Kramer*, above, 455 U.S. at 753; *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

One of the liberties included within this freedom of choice in family matters is the right of parent and child to maintain, mold, and cultivate their ongoing relationship. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley*, above. This fundamental right which the Court has called the right of parental autonomy or the right of family integrity is not diminished because the nuclear family has been fractured by divorce. *Quilloin*, above.

The right of family integrity is one of the preferred rights. "[F]reedom of choice in matters of family life is a fundamental liberty interest." *Santosky*, above; *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). When government action impugns a fundamental liberty interest, the ordinary level of constitutional review, the rational basis test, is discarded. Instead the highest level of constitutional analysis, the strict scrutiny test, is used to determine whether the government action can pass constitutional muster. Under strict scrutiny analysis the state must demonstrate an overwhelming government interest and the state must use the least restrictive means to accomplish its purpose. *Caroline Products Co. v. United States*, 304 U.S. 144 (1937); *Poe v. Ullman*, 367 U.S. 497 (1961); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Stanley*, above; *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

In *Smith*, above, Justice Stewart described the parameters of the state's power to intrude in the parent child relationship as follows:

> One of the liberties protected by the due process clause. . . . is the freedom to 'establish a home and bring up children. . . .' If a State were to attempt to force the breakup of a natural family over the objections of their

> parents and their children without some showing of unfitness and the sole reason to do so was thought to be the child's best interest, I should have little doubt that the state would have intruded impermissibly on 'the private realm of family life which the state cannot enter.' 431 U.S. at 862-63.

Justice Stewart was merely reiterating the Court's holding in *Stanley* and a long line of cases extending back to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) that have held that while the state has a legitimate interest in protecting minor children, that interest is circumscribed by the United States Constitution and the State's interest is not furthered by separating children from their parents except in egregious circumstances. In *Pierce*, the Court was clear that "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534-535. The Court's rulings in *Stanley*, *Smith*, *Pierce*, *et al.* upholding the right of family integrity warrant an inference that <u>if</u> there is a conflict between the best interest standard, a mere rule of evidence, and the United States Constitution, then best interest must yield to the Constitution.[1]

---

[1] U. S. Const., art. VI, cl. 2 states "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Court has stressed that the constitutional protection granted the family is based on the "emotional attachments that derive from the intimacy of daily association." Such intimate "emotional attachments" are necessarily reciprocal, in which each of the participants has a linked, but plainly separate, interest. *Smith*, above, at 844. The right to family integrity is an "important interest of both parent and child," *Stanley*, above. at 657; for "minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1956). See also *In Re Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment or the Bill of Rights is for adults alone").

The right of parental integrity "encompasses a wide variety of choices and activities" including "among the most important" the freedom of the parent and child to maintain, cultivate, and mold their ongoing relationship." *Franz, et al. v. United States*, 707 F.2d 582, 595 (1983), U.S. App. LEXIS 28130 citing *Quilloin,* above, 434 U.S. at 255 (dicta); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley* above at 651 ; and *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2nd Cir. 1977).

> The constitutional interest in the development of parental and filial bonds free from government interference has many avatars * * * above all, it is manifested in the reciprocal rights of parent and child to one another's 'companionship.'
>
> *Franz*, id citing *Stanley*, above, at 651; *Duchesne*, above, at 825.

The only way that a divorced parent and child can "maintain, cultivate and mold their ongoing relationship" is through visitation. For the divorced non-custodial parent the emotional attachments that are the foundation of the constitutional right at issue here cannot develop with consistent contact as much as possible with the child. Simply stated, the emotional attachments will atrophy and wither if the non-custodial parent is put in the position of a friendly uncle or aunt who shows up every other weekend to see the child in an artificial situation such as lunch at a fast food restaurant or a movie. For the emotional attachments to develop, the non-custodial parent must enter into the warp and woof of the child's life. It is noteworthy, that this constitutional right is unique in that it is the only constitutional right that is dependent on emotional attachments that transcend legal categories such as property rights or legal relationships such as principal-agent or corporation-corporate officer.

CONCLUSION

This Court should be particularly vigilant in safeguarding the Constitution from the rapaciousness of state intervention, including myopic and misguided decisions by the state judiciary. Lip service to "family values" or to the family as the bedrock of a democratic, free society mean nothing if a family fractured by divorce is to be further torn asunder by unnecessarily limiting the contact between the non-custodial parent and his children. Of course, it is the child who is hurt the most by such ill-considered limitations. The Petition for Writ Certiorari should be granted.

THE CHILDREN'S RIGHTS COUNCIL
By Counsel

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